

Internal Revenue Service  
**memorandum**

date: **DEC 17 1991**

to: Director, Internal Revenue Service Center  
Kansas City, MO  
Attn: Entity Control

from: Technical Assistant  
Employee Benefits and Exempt Organizations

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subject: CC:EE:3 - TR-45-2031-91  
Railroad Retirement Tax Act Status

Attached for your information and appropriate action is a copy of a letter from the Railroad Retirement Board concerning the status under the Railroad Retirement Act and the Railroad Unemployment Insurance Act of:

[REDACTED]

We have reviewed the opinion of the Railroad Retirement Board and, based solely upon the information submitted, concur in the conclusion that [REDACTED] is an employer covered under the Railroad Retirement Act and Railroad Unemployment Insurance Act effective [REDACTED]. It should file a Form CT-1 for [REDACTED] and subsequent years and Forms 941-E for the appropriate periods.

(Signed) Ronald L. Moore

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RONALD L. MOORE

Attachment:

Copy of letter from Railroad Retirement Board

cc: Mr. Gary Kuper  
Internal Revenue Service  
200 South Hanley  
Clayton, MO 63105

08906



UNITED STATES OF AMERICA  
RAILROAD RETIREMENT BOARD  
844 RUSH STREET  
CHICAGO, ILLINOIS 60611

BUREAU OF LAW

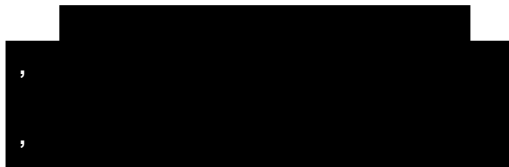
Assistant Chief Counsel  
Employee Benefits and Exempt  
Organizations  
Internal Revenue Service  
1111 Constitution Avenue, NW.  
Washington, D.C. 20224

NOV 04 1991

Attention: CC:IND:1:3

Dear Ladies and Gentlemen:

In accordance with the coordination procedure established between the Internal Revenue Service and this Board, I am enclosing for your information a copy of an opinion in which I have expressed my determination as to the status under the Railroad Retirement and Railroad Unemployment Insurance Acts of the following:



Sincerely,

Steven A. Bartholow  
Deputy General Counsel

Enclosure

COVMEMO.COV

UNITED STATES GOVERNMENT

RAILROAD RETIREMENT BOARD

**MEMORANDUM**

OCT 30 1991

TO: Director of Research and Employment Accounts

FROM: Deputy General Counsel

SUBJECT: [REDACTED]  
Employer Status

This memorandum sets forth my opinion as to the employer status of [REDACTED] (hereafter [REDACTED]) under the Railroad Retirement and Railroad Unemployment Acts (hereafter the Acts).

In response to a subpoena issued by the Secretary to the Board, [REDACTED] submitted a letter dated [REDACTED], with attachments, which provide the basic facts which are set forth in this memorandum. The facts as set forth in that letter were supplemented by an additional letter from [REDACTED] dated [REDACTED], in response to correspondence from this office seeking additional information.

[REDACTED] is wholly owned by [REDACTED], a partnership comprised of [REDACTED] and [REDACTED] (hereafter [REDACTED]). [REDACTED] is a carrier by railroad, which at its inception operated approximately [REDACTED] miles of track in the state of Washington. See ICC Finance Docket No. [REDACTED]. [REDACTED] has been held to be an employer under the Acts (BA No. [REDACTED]) since [REDACTED]. See Legal Opinion [REDACTED].

[REDACTED] has a [REDACTED] percent interest in the partnership which owns [REDACTED] and [REDACTED] has a [REDACTED] percent interest in the partnership. [REDACTED] is the sole shareholder of [REDACTED]. He is the president and a director of [REDACTED] and [REDACTED]. [REDACTED] is the secretary/treasurer and a director of each company. Each company has a two-member board of directors.

According to [REDACTED]'s letter dated [REDACTED], "[REDACTED] was founded in [REDACTED]. Its principal lines of business are rail car repair, locomotive repair, maintenance of way services, railroad construction (primarily highway grade crossings) and tourism (primarily operation of a dinner train).

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Since its inception, [REDACTED] has actively solicited business from common carrier railroads, private carrier railroads, governmental entities and private industry. Its largest customer is the [REDACTED]

Although [REDACTED] is a partner in the partnership that owns [REDACTED] the company was not established by [REDACTED] in order to move any rail-related functions away from existing [REDACTED] employees to [REDACTED]. From the time it was founded in [REDACTED], [REDACTED] has contracted out maintenance of way functions (including signal work), and all locomotive and rail car repair work. The companies that provided these services to [REDACTED] prior to [REDACTED] -- [REDACTED] and [REDACTED] -- were not owned or controlled by [REDACTED] or its sole shareholder.

[REDACTED] maintains and operates a rail car repair shop located in [REDACTED], Washington. All of [REDACTED]'s operations are conducted out of this facility (with the exception of maintenance of way and construction services which, by their nature, must be provided on the property of the customer). The shop facility is owned by [REDACTED], and is occupied and used by [REDACTED] under an arrangement whereby [REDACTED] provides car inspection services and derailment clean-up services to [REDACTED] in exchange for the right to occupy and use the shop.

[REDACTED] had [REDACTED] employees as of [REDACTED]. [REDACTED] employees perform work on properties owned by common carrier railroads and private carrier railroads (including industrial spur tracks). These companies include [REDACTED], [REDACTED], [REDACTED], [REDACTED] and numerous others. In maintenance of way operations, as many as [REDACTED] employees work on the properties of a common carrier or private carrier; in signal maintenance operations, as many as [REDACTED] employees work on the properties of a common carrier or private carrier; in locomotive maintenance operations, as many as [REDACTED] employees work on the properties of a common carrier or private carrier; and in providing administrative services, as many as [REDACTED] employees work on the properties of a common carrier or private carrier.

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█'s revenues for █ were as follows:

Revenues:

Mechanical Repair Dept:

Other Railroads

Car Clean

Locomotives

Total

Tourism:

Railroad Const. Dept.:

Maintenance

Construction Income

Other Income:

Services

Interest

Misc.

Total Income:

Other

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231 (a)(1)) provides in pertinent part as follows:

"The term "employer" shall include--

(i) any express company, sleeping-car company, and carrier by railroad, subject to part I of the Interstate Commerce Act;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking

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service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad \* \* \*."

A similar provision is contained in section 1(a) of the Railroad Unemployment Insurance Act (45 U.S.C. § 351(a)).

The Board has by regulation set forth guidance with respect to the meaning of the terms "control" and "common control." Those regulations provide as follows:

"§ 202.4 Control.

A company or person is controlled by one or more carriers, whenever there exists in one or more such carriers the right or power by any means, method or circumstance, irrespective of stock ownership to direct, either directly or indirectly, the policies and business of such a company or person and in any case in which a carrier is in fact exercising direction of the policies and business of such a company or person.

§ 202.5 Company or person under common control.

A company or person is under common control with a carrier, whenever the control (as the term is used in § 202.4) of such company or person is in the same person, persons, or company as that by which such carrier is controlled."

The power of control "need not be exercised in some affirmative, spectacular manner in order to amount to actuality of control". Universal Carloading & Distributing Co. v. Railroad Retirement Board, 172 F. 2d 22,26 (D.C. Cir. 1948).

It appears clear that [REDACTED] is not a carrier by railroad. However, [REDACTED] is the president and a director of both a rail carrier ([REDACTED]) and [REDACTED]. He also has controlling stock ownership in that rail carrier. Moreover, the other principal officer of [REDACTED] is also an officer and director of that rail carrier. Based on these facts, I conclude that [REDACTED] is under common control with [REDACTED], an affiliated rail carrier. See Utah Copper Co. v. Railroad Retirement Board, 129 F. 2d 358,363 (10th Cir., 1942).

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Nevertheless, this is only the first part of the test set forth in section 1(a)(1)(ii). Since it is not itself be a carrier by rail, in order to be found to be an employer under the Acts must, in addition to being under common control with one or more railroad employers, be performing "services in connection with the transportation of passengers or property by railroad."

The question of what constitutes "services in connection with the transportation of passengers or property by railroad" has been considered on several occasions. In Adams v. Railroad Retirement Board, 214 F. 2d 534, 542 (9th Cir. 1954), the Court held that the provision of "accounting services, the services of a purchasing department, \* \* \* correspondence and stenographic services \* \* \* bridge and building services, a safety engineer and repairs for its automotive equipment and its general rolling stock" by a carrier's affiliate were services in connection with rail transportation so as to render the affiliate an employer under the Acts. In Southern Development Co. v. Railroad Retirement Board, 243 F. 2d 351 (8th Cir. 1957), the Court held that a railroad affiliate which owned and operated an office building "almost exclusively for use by a railroad company for ticket selling and general offices could reasonably be considered [to be performing] a service connected with and supportive of rail transportation" and was an employer under the Acts. 243 F. 2d at 355. In Railroad Concrete Crosstie Corp. v. Railroad Retirement Board, 709 F. 2d 1404 (11th Cir. 1983), the Court held that the provision of crossties by a manufacturer to its railroad carrier affiliate was "supportive of transportation and essential to its proper functioning." 709 F. 2d at 1410, quoting Southern Development Co. Consequently, the manufacturer of crossties was an employer under the Acts.

In Itel Corp. v. United States Railroad Retirement Board, 710 F. 2d 1243, 1248 (7th Cir. 1983), the court held that the leasing of rail cars is not a service in connection with the transportation of passengers or freight by rail. The Seventh Circuit read section 1(a)(1)(ii) of the Act as applying to services covered by the Interstate Commerce Act or where the related entity exists to serve the rail carrier affiliates and where its primary purpose is to remove employees from coverage under the Railroad Retirement Act.

In a later decision, Standard Office Building Corporation v. U.S., 819 F. 2d 1371 (7th Cir. 1987), the Seventh Circuit was somewhat critical of its reading of section 1(a)(1)(ii) in the Itel decision. The Seventh Circuit stated that:

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"Our attempt to yoke together the Interstate Commerce Act and the railroad retirement acts overlooked, however, the asymmetry of the regulatory schemes. Suppose a railroad spun off all its brakemen into a subsidiary. Although the function performed by the brakemen would not be directly subject to the Commission's price and service regulation, because it wouldn't be a carrier service--that is, a service sold to shippers or passengers--there would be indirect regulation, because the ICC can always disallow improvidently incurred costs of service.

\* \* \* \* \*

"Thus there was no need to interpret the words performs 'all services in connection with' rail transportation in the Interstate Commerce Act (49 U.S.C. § 1(3)(a), repealed in 1980) to reach services not directly regulated by the ICC: those services were subject to indirect regulation. But if a railroad could avoid railroad retirement tax by spinning off its brakemen into a subsidiary which then sold their services back to the railroad and not to the shipping public, so that these services were not regulated by the ICC in the sense used in ITEL, this would be a massive evasion of the railroad retirement acts, for there is no indirect regulation of retirement. That is why the court in ITEL added the second step of its analysis: even if the service performed by the affiliate is not a (directly) regulated service, it is subject to those acts if the intent is to undermine them. Really the whole weight of the analysis falls on the second step, which by making intent the central issue injects an undesirable element of uncertainty into the administration of the railroad retirement acts." 819 F. 2d at 1378.

In refusing to accept the argument of Standard Office Building Corporation that section 1(a)(1)(ii) of the Act applies only to "the 'direct' performance of railroad service by operating employees," the Seventh Circuit stated that:

"The distinction is unrelated to the purpose of the statute because the words 'performs any service ... in connection with [rail] transportation' were intended to exclude services unrelated to rail transportation, such as operating an amusement park open to the public on land owned by the railroad, rather than to make a hair-splitting distinction between workers who 'really' run the railroad and those who back up the former

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group. The Act covers 'substantially all those organizations which are intimately related to the transportation of passengers or property by railroad in the United States.' S.Rep. No. 818, 75th Cong., 1st Sess. 4 (1937). This would describe a wholly owned subsidiary to which a railroad spun off its entire nonoperating staff." Id., at 1376.

The court in Standard Office Building concluded that the best approach to resolving questions as to whether a service performed by an affiliated entity is a service in connection with rail transportation "is one that will minimize corporate reorganization designed to avoid railroad retirement tax liability and will protect reasonable expectations." Id., at 1379. In making its determination, the Seventh Circuit looked to the history of the entity (which was formed 35 years before enactment of the Railroad Retirement Tax Act), the situation and expectations of the employees (they were not members of railway labor organizations), and the degree to which the affiliate services the rail carrier affiliate(s). Id., at 1379-1380.

After holding that Standard Office Building was not a covered employer, the court specifically declined to express an opinion as to whether its holding would have been different had the company not been formed 35 years prior to enactment of the Railroad Retirement Tax Act or if the percentage of the rail affiliate's occupancy in the building been higher than the 42-57 percent range in the years in question. Id., at 1380.

According to the letter dated [REDACTED] [REDACTED] is providing "railroad related services" (see response to question number 12). [REDACTED] performs many services traditionally performed by railroads to facilitate the transportation of passengers or freight by rail. These services, such as maintenance of way operations and car repair operations, are "intimately related to the transportation of passengers or property by railroad in the United States" (S. Rep. No. 818, 75th Cong., 1st. Sess. 4 (1937)) and are services which the railroads could perform for themselves but have chosen to have [REDACTED] perform on their behalf. They are also services "supportive of transportation and essential to its proper functioning." Crosstie, supra at 1401. Moreover [REDACTED] provides "personnel/secretarial services and most financial services" for [REDACTED]. Over [REDACTED]% of [REDACTED]'s revenue is derived from its affiliated rail carrier, [REDACTED]. Most of the remainder is derived from other railroad carriers.

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According to [REDACTED]'s letter of [REDACTED], [REDACTED]% of [REDACTED]'s staff time during [REDACTED] and [REDACTED] was spent in performing service for [REDACTED].

Based on the above discussion of the facts and precedent case law, I conclude that the services being performed by [REDACTED] for [REDACTED], its rail carrier affiliate, are "services in connection with the transportation of passengers or property by railroad," and since the services in question generate [REDACTED]% of [REDACTED]'s total revenues on an annual basis and occupy [REDACTED]% of [REDACTED]'s staff time, those services are not casual service. Casual service is defined by Board regulation (20 CFR 202.6) as service which is "so irregular or infrequent as to afford no substantial basis for an inference that such service \* \* \* will be repeated, or whenever such service \* \* \* is insubstantial." Given the relationship between [REDACTED], its officers and directors, and [REDACTED] and the large portion of its total revenue ([REDACTED]%) which is derived by [REDACTED] from the railroad industry, this service in connection with rail transportation cannot be considered to be casual under the Board's regulations.

On the basis of the above, it is my opinion that [REDACTED] is an employer covered under the Acts. [REDACTED] has been an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts since [REDACTED].

An appropriate G-215 giving effect to this determination is attached.



Steven A. Bartholow



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